No. 20104

United States
COURT OF APPEALS
for the Ninth Circuit

TILLAMOOK CHEESE & DAIRY ASSOCIATION,

Plaintiff-Appellant,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, H. S. DIXON, GAYLORD P. SHIVELY, JOHN S. CRAVEN, JR., OTTO SCHILD and WARREN A. McMINIMEE,

Defendants-Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

J. PIERRE KOLISCH,
1004 Standard Plaza,
Portland, Oregon 97204,
Attorney for Defendants-Appellees.

KOLISCH & HARTWELL,
JON M. DICKINSON,
1004 Standard Plaza,
Portland, Oregon 97204,
Of Counsel.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE 8-65

INDEX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Cont.)

STATUTES

No. 20104

United States
COURT OF APPEALS
for the Ninth Circuit

TILLAMOOK CHEESE & DAIRY ASSOCIATION,

Plaintiff-Appellant,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, H. S. DIXON, GAYLORD P. SHIVELY, JOHN S. CRAVEN, JR., OTTO SCHILD and WARREN A. McMINIMEE,

Defendants-Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

COUNTER STATEMENT OF CASE

A. The Parties.

This is an action for alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Plaintiff-appellant (TC&DA) is an agricultural cooperative engaged in the production and marketing of dairy prod-

ucts. Defendants-appellees are an agricultural marketing cooperative (TCCA), certain of its officers (H. S. Dixon and John S. Craven, Jr.), its general counsel (Warren A. McMinimee), and certain officers of other agricultural producing cooperatives which are members of TCCA (Gaylord P. Shively and Otto Schild).

Appellee TCCA is a federated cooperative which is the exclusive marketing agent for its producer-member cooperatives, each of which comprises numerous individual patron-producers of dairy products. TCCA has been the exclusive marketing agent for its members since 1917. For many years, prior to September, 1963, appellant and its predecessors were members of TCCA. In September, 1963, appellant voluntarily withdrew from membership, and shortly thereafter launched for the first time its own program for marketing dairy products.[1] Several months after its entry as a marketer, in May, 1964, appellant commenced the present action.

For a number of years, Mr. McMinimee has been employed by TCCA as its general counsel,[2] and prior to his inclusion as a party defendant, he was actively representing TCCA in this suit, as well as in other suits between TCCA, TC&DA and appellant, Red Clover. He was also representing some of the individual defendants. Carl Cadonau is general manager of Alpenrose Dairy,

---

[1] Appellant's Opening Brief, p. 16, where it admits that it is a "fledgling" in its marketing activities. (The following designations will be used throughout this brief: "R." to designate the Clerk's record and "Tr." to designate the Reporter's transcript).

[2] R. 115, 117; Tr. 239.

Inc. which has been and still is an important milk-purchasing customer of TCCA.[3]

B. The Litigation to Date.

To date, the litigation has involved the filing of three complaints: a first complaint which charged appellees, absent Warren A. McMinimee, with conspiracies under Sections 1 and 2 of the Sherman Act,[4] and which was dismissed in August, 1964, for failure to name capable co-conspirators;[5] a first amended complaint which included the Section 1 conspiracy charges of the first complaint, but which added Warren A. McMinimee as a defendant and co-conspirator, and Carl Cadonau as a co-conspirator, and which further altered the claim under Section 2 of the Sherman Act from conspiracy to attempted monopoly;[6] and a second amended complaint which substituted Alpenrose Dairy, Inc. for Carl Cadonau as a co-conspirator.[7] In all three of the complaints, the alleged violations are recited only in the conclusory language of the statute.

The motion to dismiss the first complaint was granted with leave to add appropriate parties.[8] Thereafter, appellant filed a first amended complaint,[9] and then a second amended complaint.[10] Appellees filed motions for

---

[3] R. 111; R. 115; Tr. 269.
[4] R. 1.
[5] R. 85; R. 91.
[6] R. 92.
[7] R. 380.
[8] R. 91.
[9] R. 92.
[10] R. 380.

summary judgment directed, respectively, against appellant's first and second amended complaints.[11] In support of their motions they presented affidavits of H. S. Dixon,[12] Carl Cadonau,[13] and Warren McMinimee.[14] In opposition to the motions appellant presented numerous affidavits,[15] submitted about 260 detailed interrogatories,[16] 69 of which have been fully answered,[17] conducted 8 depositions,[18] and took the testimony of Warren McMinimee and Carl Cadonau in open court.[19] The court held two hearings with respect to appellees' motions against the complaints. The court partially granted appellees' motions against the second amended complaint, dismissing the conspiracy charges against all ap-

---

[11] R. 108, 391, 411.

[12] R. 113.

[13] R. 110.

[14] R. 117.

[15] Affidavits of: George Milne, September 30, 1964, R. 139; Hans Leuthold, November 24, 1964, R. 330; Del Mayer, November 24, 1964, R. 338; Joe Donaldson, November 20, 1964, R. 340; Glenn Johnston, November 20, 1964, R. 343; Floyd Woodward, November 20, 1964, R. 345; Vern Lucas, November 20, 1964, R. 346; George Milne, November 23, 1964, R. 349; Barbara Milne, November 20, 1964, R. 362; Clem Hurliman, November 21, 1964, R. 367; Basil Tone, November 20, 1964, R. 372; and Evelyn Pallin, November 20, 1964, R. 374.

[16] Interrogatories to Warren A. McMinimee, R. 143; Interrogatories to TCCA, R. 156; Interrogatories to Otto Schild, R. 161; Interrogatories to Gaylord P. Shively, R. 167; and Interrogatories to John S. Craven, Jr., R. 206.

[17] Answers of Warren A. McMinimee, R. 298; Answers of Otto Schild, R. 316; Answers of Gaylord P. Shively, R. 321; Answers of John S. Craven, Jr., R. 326.

[18] Tr. 232, 233; Depositions of: J. E. "Bud" Davis, Arnold Walker, Virgil Chadawick, Karl T. Zweifel, Carl L. Hurliman, Gene Widmer, Millard Bailey, and Rudolph J. Fenk, all taken on October 13, 1964.

[19] Appellant's counsel referred to the appearances of McMinimee, Tr. 239-268, and Cadonau, Tr. 268-307, as appearances of "court's witnesses", Tr. 230.

pellees (first claim),[20] and dismissing the attempted monopoly charges against appellee Warren McMinimee (second claim).[21] The present appeal is taken from both summary judgments of dismissal.[22]

C. Positions of the Parties.

Appellees' position is that the case was ripe for summary judgment for the reason that although appellant was afforded every opportunity, through extensive discovery proceedings and court hearings, to support its naked conclusory allegations of conspiracy and attempted monopoly, it failed to produce any support therefor.

Appellant's position, in essence, is that summary judgment is inappropriate in an antitrust suit, and that by alleging anti-trust violations in the language of the statute, which violations are denied by appellees, a genuine issue of material fact exists.

QUESTIONS PRESENTED

1. Is not summary judgment dismissal of a conspiracy charge in an antitrust suit against an agricultural cooperative and its agents correct where plaintiff has been afforded every opportunity but has failed to show any "outside party" as participating in the alleged conspiracy?

---

[20] Order on Defendants' Motion for Summary Judgment, R. 409; Amended Order on Defendants' Motion for Summary Judgment and Summary Judgment, R. 437.

[21] R. 441.

[22] Notice of Appeal, R. 432; Amended and Supplemental Notice of Appeal, R. 439.

2. Is not summary judgment dismissal of an attempt to monopolize charge against a lawyer in an antitrust suit against the lawyer and his client correct where plaintiff has been afforded every opportunity but has failed to show that the lawyer has attempted to monopolize or has conducted himself other than as a legal adviser, and where undisputed facts show that the attorney-client relationship between him and his client has always been maintained?

SUMMARY OF ARGUMENT

The conspiracy charges against all appellees were properly dismissed by summary judgment because, despite three opportunities to do so, appellant was unable to show that there was a capable "outside person" with which the agricultural cooperative, TCCA, conspired to violate the antitrust laws.

Summary judgment was properly granted with respect to the attempt to monopolize charge against TCCA's general counsel, Warren McMinimee, because appellant was unable to show that Warren McMinimee acted other than as an attorney in all his dealings with the other appellees.

Partial summary judgment was particularly appropriate in this case where exhaustive discovery, including numerous depositions, interrogatories and testimony of key witnesses before the court, failed to produce any material fact dispute.

ARGUMENT

I. Summary Judgment was Properly Granted With Respect To the Conspiracy Charges Against All Appellees.

The trial court correctly found in its opinion of August 6, 1964,[23] that the conspiracy charges against certain of the appellees should be dismissed under authority of *Sunkist Growers et al* v. *Winckler & Smith Citrus Products Co., et al,* 1962, 370 U.S. 19, 8 L. Ed. 2d 305 because there were no "outside persons" named with which appellee TCCA, an agricultural cooperative, could have conspired. Appellant sought to remedy this by amendments to the complaint adding the name of TCCA's general counsel, Warren McMinimee, as a defendant and an alleged co-conspirator and a customer of TCCA, Alpenrose Dairy, Inc., as another alleged co-conspirator, but not as a defendant.

In order to determine the possible involvement of Mr. McMinimee and Alpenrose in the alleged antitrust violations, and whether they were "outside persons" who conspired with the other appellees or attempted to monopolize commerce, appellant was permitted the extensive pre-trial discovery previously mentioned.[24]

---

[23] R. 85.

[24] In addition to discovery, appellant had the benefit of much live testimony. At a hearing on appellant's motion for preliminary injunction (Tr. Vol. II) in answer to a question from the Court (Tr. 34), appellant's counsel stated that appellant was treating the Minnesota cheese situation as an incident of the alleged antitrust conspiracy of appellees, and thereafter examined in open court appellee Dixon (Tr. 36-90, 154-155), Roger Higgins, appellant's CPA (Tr. 91-93), Allen Thomas, an employee of appellant TC&DA (Tr. 94-115), George Milne, president of appellant (Tr.

The sum and substance of appellant's exhaustive investigation is that Mr. McMinimee and Alpenrose Dairy are not now, and never have been, involved in any violations of the antitrust laws, and are not capable coconspirators.

In the case of Mr. McMinimee, the record shows that in addition to submitting an affidavit[25] and answering interrogatories,[26] he testified in court concerning his relationship and activities with respect to the other appellees.[27] All of that established that he is a lawyer who has been general counsel to TCCA since 1958 and has represented certain others of the individual appellees as an attorney.[28] His thorough answers to interrogatories showed clearly the attorney-client relationship which he maintained with TCCA and others, and this was in no way refuted by the searching examination of appellant's counsel.[29]

Appellant's affidavits of Basil Tone, Clem Hurliman, Floyd Woodward, Vern Lucas, Barbara Milne, Glen Johnston, Del Mayer, Joe Donaldson and George Milne,[30] which supposedly show "specific facts" to the con-

---

116-130), Basil Tone, president of appellant Red Clover Creamery Association (Tr. 131-136), Hans Leuthold, a member of the Board of TC&DA (Tr. 137-143), and Robert Kerr, an attorney for TC&DA specializing in cooperative corporate affairs (Tr. 143-153). The examination of these witnesses was not limited to Minnesota cheese, but covered a wide range of subjects which would have revealed illegal conduct on the part of appelles, had there been any.

[25] R. 117.

[26] R. 298.

[27] Tr. 239-268.

[28] Tr. 239.

[29] See footnote 27 above.

[30] See footnote 15 above.

trary, say nothing more than this: that Warren McMinimee went to numerous meetings, some of which were attended by a majority of the board members of TCCA; that he conferred with the board members at those meetings; and that occasionally he expressed his opinions on matters concerning TCCA. Plainly, these actions do not support appellant's position that Mr. McMinimee is an *independent* and *outside* party who has entered into a conspiracy. No amount of characterization of his conduct as wrongful and sinister can avoid the fact that appellant has failed to show facts supporting its conclusion that his conduct has been inconsistent with his duties as an attorney for TCCA.

Nor are there facts to support charges of conspiracy between TCCA and Alpenrose Dairy. Again, as with Mr. McMinimee, it is the characterizations of facts which are in dispute, not the facts themselves. Alpenrose Dairy meets the threshold requirement of being an independent person, separate from TCCA. The sole question therefore is whether appellant has produced facts to challenge appellees' clear showing that Alpenrose Dairy, acting by and through Carl Cadonau, is nothing more than a mere customer of TCCA.

The relationship between Alpenrose and TCCA was fully developed in the Cadonau and Dixon affidavits[31] and by Mr. Cadonau's testimony.[32] The undisputed facts show that Alpenrose is a customer of TCCA, that it purchases only a part of its milk requirements from

---

[31] R. 110, 113.

[32] Tr. 268-307.

TCCA, that it has had a good working relationship with TCCA through Mr. Dixon, and that there has never been any relationship between Alpenrose and TCCA different from supplier-purchaser.[33]

In opposition to these facts, appellant has come forth with vague opinions and conclusions. In his first affidavit, George Milne says that he is "informed," and therefore "believes" "* * * that Mr. Cadonau participated directly or indirectly in the agreement, combination or conspiracy which is the subject of plaintiff's complaint * * *",[34] and that Cadonau made it "clear" that TCCA would lose Alpenrose's business if Dixon were discharged.[35] What he refers to by this latter assertion is a letter sent by Cadonau to TCCA.[36] The letter, which shows nothing more than an expression of satisfaction from a customer, clearly does not help to support a charge of antitrust conspiracy. Mr. Milne's beliefs and conclusions, worded in the vague language of the Sherman Act, are certainly not "facts."

The sum and substance of the Leuthold affidavit is that Alpenrose liked doing business with TCCA.[37] The affidavits of Del Mayer and Vern Lucas tell nothing more.[38]

Legal conclusions, innuendos, assertions and *ad hominem* attacks in the affidavits are appellant's rebuttal

---

[33] R. 111-112, 115; Tr. 269-271.
[34] R. 140.
[35] R. 141.
[36] R. 337.
[37] R. 330-336.
[38] R. 338, 346.

"facts." Out of a normal customer relationship, appellant has sought to fabricate an illegal conspiracy to restrain trade. The lack of supporting facts suggests strongly that this has been done solely to make formal compliance with the requirement of alleging outside parties as co-conspirators with TCCA, and perhaps also to embarrass TCCA by involving one of its good customers, Alpenrose, in a lawsuit.

In order to make the conspiracy charge stand, appellant had to show that there was at least one capable co-conspirator, i.e., someone outside the TCCA cooperative family who did engage in some illegal conduct. Appellant picked Mr. McMinimee and Alpenrose for this role, but was unable to develop any facts in support of that position despite a solemn representation to the court that Mr. McMinimee acted other than as a lawyer, and that he engaged in an illegal conspiracy with his client. The court felt that its hands were tied in view of counsel's representation, and permitted counsel the opportunty he requested by way of depositions, hearings and briefs to try and develop facts in support of the allegations against Mr. McMinimee.[39]

The *Sunkist* case, supra, controls the situation and appellant doesn't avoid it simply by naming as a co-conspirator an admittedly outside party such as Alpenrose, when in fact there is no showing of illegal conduct involving that party. Appellant's case is built on conclusory assertions which it argues should be accepted as true despite the opportunity but complete failure to

[39] Tr. 216.

show supporting facts. Mere bold assertions that TCCA has not operated as a lawful cooperative[40] do not get around the *Sunkist* case any more than does picking the name of an outside party such as Alpenrose. If it were otherwise, *Sunkist* would be meaningless in that it could be circumscribed simply by an allegation that a cooperative defendant is not legally carrying out legitimate objectives of the association.[41]

---

[40] Appellant's Opening Brief, pp. 31-33.

[41] Another attempt by appellant to confuse the issue and seek to distinguish from *Sunkist* appears on page 28, footnote 15 of Appellant's Opening Brief where it is suggested that TCCA does not qualify as a Capper-Volstead cooperative. That act provides in pertinent part, 7 U.S.C. § 291:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> "First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> "Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> "And in any case to the following:
>
> "Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

TCCA fully qualifies thereunder. Furthermore it is alleged in the second amended complaint, paragraph II (R. 381) that TCCA is an Oregon cooperative corporation ". . . organized and existing under and by virtue of the Oregon Cooperative Corporation Act . . . and is an agricultural cooperative and marketing agency for its members and patrons."

II. Summary Judgment was Properly Granted With Respect To the Attempt to Monopolize Charge Against Warren McMinimee.

In granting the motion for summary judgment with respect to the attempt to monopolize charge against Mr. McMinimee, the trial court recognized that his relationship with the others was purely that of attorney-client. Despite ample opportunity, appellant was unable to show anything different.

At the hearing on October 5, 1964, the court was disposed to grant appellees' motion to the extent of dismissing Mr. McMinimee as a defendant.[42] However, in view of appellant's counsel's representation that given additional opportunity for discovery he would show the court that Mr. McMinimee acted other than as a lawyer and general counsel for TCCA, the court did not dismiss Mr. McMinimee at that time.[43]

The inclusion of Mr. McMinimee as a defendant was not only legally improper and completely unnecessary to protect appellant's alleged rights, but it was a reprehensible attempt to place him and his clients under the disabilities incident to their being co-defendants in the same lawsuit

III. Summary Judgment is Particularly Appropriate in the Present Case.

Rule 56 F.R.C.P. provides in pertinent part:

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is as-

---

[42] Tr. 209, 212.

[43] Tr. 216.

serted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

* * * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affi-

davits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The purpose of Rule 56 "is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings."[44] The sufficiency of the allegations of a complaint do not determine a motion for summary judgment particularly where they have been pierced and where the state of the record shows that there is no genuine issue of material fact to be tried despite formal conflicts in the pleadings.[45]

The appropriateness of summary judgment in a situation such as the present was emphasized by the July 1, 1963 above-quoted amendment to Rule 56(e).

Appellant here is relying on its own assertions—the conclusory matter in the complaint—rather than on supporting facts to show that there is a genuine issue for trial. As pointed out in the note of the Advisory Committee accompanying the amendment to Rule 56(e), and in cases applying the amended rule, when one has by affidavits, depositions and otherwise denied the existence of the charges and any material fact and moved for summary judgment, the burden is placed on the party opposing the motion to come forth with *specific*

---

[44] *Koepke* v. *Fontecchio,* 9 Cir., 1949, 177 F.2d 125, 127.

[45] *Lindsey* v. *Leavy et al,* 9 Cir., 1945, 149 F.2d 899; *Byrnes* v. *Mutual Life Insurance Co. of New York,* 9 Cir., 1954, 217 F.2d 497; *MacKay* v. *American Potash & Chemical Co.,* 9 Cir., 1959, 268 F.2d 512.

facts, not with generalized denials and conclusory statements contained in pleadings and affidavits, to establish the existence of a genuine triable issue of fact.[46]

A reading of the complaints[47] herein shows that appellant really doesn't have any claim against appellees under the antitrust laws. And the trial court could well have dismissed the entire complaint instead of granting only partial summary judgment. This case is just another expression of the bitter acrimony existing between the parties which has manifested itself in a series of lawsuits on various issues in the state and federal courts.

Appellant is an admitted newcomer in the marketing of dairy products and has suffered the problems and frustrations of anyone launching itself into a highly competitive market with no prior experience. Appellant seeks to blame appellees for all its problems and to cloak its mistakes and failures as part of a sinister plot on the part of appellees to destroy appellant's business.

Conclusory statements in a complaint alleging violations of the antitrust laws are not favored and a properly supported motion for summary judgment is the correct way of attacking such a complaint and determining

---

[46] Advisory Committee note accompanying Rule 56(e); *Scolnick* v. *Lefkowitz,* 2 Cir., 1964, 329 F.2d 716; *Weyerhaeuser* v. *Gershman,* 2 Cir., 1963, 324 F.2d 163; *Norton* v. *McShane,* 5 Cir., 1964, 332 F.2d 855; *Pugliano* v. *Staziak,* D.C.W.D. Pa., 1964, 231 F. Supp. 347; *State of Maryland* v. *U. S.,* D.C.E.D. Pa., 1963, 221 F. Supp. 740.

[47] R. 1, 92, 380.

whether there is really any triable issue between the parties.[48]

Appellant has placed heavy reliance on *Poller* v. *Columbia Broadcasting Co.*, 1962, 368 U.S. 464, 7 L. Ed. 2d 458 as barring summary judgment in antitrust cases.[49] Examination of the facts and later Supreme Court cases shows that no such bar exists.

Poller involved an alleged conspiracy under Sections 1 and 2 of the Sherman Act to eliminate a particular radio station and to destroy ultrahigh-frequency broadcasting. The alleged co-conspirators included CBS, one of CBS's divisions, and an individual named Holt, whom CBS had hired to perform a particular job. Plaintiff's complaint centered on CBS's cancellation of a broadcast affiliation agreement. Defendant moved for summary judgment, asserting among its grounds of defense, first, that there were no capable conspirators since CBS could conspire neither with its own division nor with its temporary agent Holt, and second, that in any event, the cancellation of the affiliation agreement was not a violation of the antitrust laws. Material submitted in connection with the motion included affidavits of several CBS officers, affidavits from certain of the alleged co-conspirators, and the deposition of CBS's president and that of a vice-president. The trial judge decided the motion in defendants' favor on the ground that the can-

---

[48] *Becker-Lehman, Inc.* v. *Firestone Tire and Rubber Co.*, D.C. Md., 1959, 202 F. Supp. 514; *Krug* v. *International Telephone & Telegraph*, D.C. N.J., 1956, 142 F. Supp. 230; *Arzee Supply Corp. of Conn.* v. *Ruberoid Co.*, D.C. Conn., 1963, 222 F. Supp. 237.

[49] Appellant's Opening Brief, pp. 25-27, 34, 35.

cellation of the affiliation agreement was an exercise of a legal right. The court of appeals affirmed.

The Supreme Court reversed with the warning that summary judgment should be used sparingly in complex antitrust cases involving conspiracy, where motive and intent play leading roles. It coupled this warning to the following significant statement:

> "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."[50]

The Supreme Court did not say, as appellant suggests, that summary judgment is particularly inappropriate in an anti-trust suit.[51] Indeed, in a later case, *The White Motor Co.* v. *U. S.*, 1963, 372 U.S. 253, 259, 9 L. Ed. 2d 738, 744, the Court said that "Summary judgments have a place in the antitrust field, as elsewhere . . . ."[52] In *Poller,* the Court said merely that where motive and intent play leading roles, and where a trial court has not had an opportunity to observe the demeanor of witnesses on the stand in order properly to evaluate their credibility, summary judgment may be inappropriate. As the warning clearly indicates, the court focused its concern on the importance of live testimoney in a conspiracy case rather than on a general unavailability of summary judgment in all antitrust suits. A comparison of the record in *Poller* with that in the present case demonstrates that its warning does not

---

[50] 368 U.S. at 473, 7 L. Ed. 2d at 464.

[51] Appellant's Opening Brief, pp. 21, 25-27.

[52] Nothing in Rule 56, F.R.C.P., suggests that antitrust suits are excepted from or treated specially under its provisions.

apply here because ours was not a trial by affidavits. Motive and intent of appellees were of no significance and in any event the trial court had the benefit of substantial live testimony.

In *Poller,* the materials presented to the trial court were completely documentary. They comprised two depositions and some affidavits. Here, the materials before the court, were extensive and exhaustive, including both documentary and live testimonial evidence. Early in the proceedings the trial court indicated an awareness of the need for a full record before ruling on summary judgment.[53] In addition to the numerous affidavits submitted by both parties, detailed answers to interrogatories by appellees, and depositions of individuals connected with TCCA, appellant took the testimony of the two key conspiracy witnesses, McMinimee and Cadonau in open court.[54] With respect to the alleged activities of these two persons appellant, in effect, had the benefit of a trial.

The record shows that from the beginning of this litigation, appellees have demonstrated a willingness and eagerness to expose the relationships between themselves, Warren McMinimee and with Carl Cadonau and Alpenrose Dairy. The first motion for summary judgment, for example, concluded with an offer to have Messrs. Cadonau, Dixon and McMinimee available to testify before the court at the hearing on the motion.[55]

---

[53] Tr. 205.

[54] Testimony of McMinimee, Tr. 239-268; Testimony of Cadonau, Tr. 268-307.

[55] R. 108.

At the hearing on October 5, 1964, appellees opened with an offer to put a witness, later identified as Carl Cadonau, on the stand,[56] but appellant's counsel objected to appellees presenting any live testimony.[57] Finally, at the hearing on November 30, 1964, when both Mr. Cadonau and Mr. McMinimee were questioned in court, they responded frankly to a searching examination of their conduct.

The spirit of openness and opportunity for direct confrontation which has prevailed in this matter contrasts sharply with the kind of drama that was the background in *Poller*—a drama of hostile conspiratorial witnesses hiding behind paper assertions of innocence.

A number of recent cases, decided since *Poller,* have demonstrated the continuing appropriateness of summary judgment in antitrust suits.

Bond Distributing Co. v. *Carling Brewing Company,* D.C. D. Maryland, 1963, 32 F.R.D. 409, aff'd, 4 Cir., 325 F.2d 158, involved an alleged conspiracy to dominate, and an attempt to monopolize, the brewing industry in the United States. Defendant moved for summary judgment. The trial court, aware of the warning in *Poller,* but concluding that plaintiff had shown nothing to support its claims, granted the motion.

Savon Gas Stations v. *Shell,* D.C. D. Maryland, 1962, 203 F. Supp. 529, aff'd, 4 Cir., 309 F.2d 306, involved a suit for alleged violations of Sections 1 and 2 of

---

[56] Tr. 162, 202.

[57] Tr. 163.

the Sherman Act. Defendant moved for summary judgment. The trial court granted the motion on the ground that the material facts, which were not in dispute, did not spell out an antitrust violation. In granting the motion, the court discussed the *Poller* case, noting its warning, but concluding that summary judgment was still equally applicable to all civil litigation, and that a case such as the one then before it, involving no material fact dispute, was an appropriate one for even a sparing use of summary judgment.

In *Fiumara* v. *Texaco, Inc.,* D.C. E.D. Pa., 1962, 204 F. Supp. 544, affirmed, 3 Cir., 310 F.2d 737, the trial court granted motions for summary judgment in favor of four oil companies and an association of oil companies charged with violations of Sections 1 and 2 of the Sherman Act. With respect to the association, its motion was granted because nothing was presented to support its inclusion as a conspirator. With respect to the four oil companies, their motion was granted because the conclusory allegations in plaintiff's amended complaint, in the face of facts presented in defendants' documents supporting the motion, were insufficient to create a material fact dispute. In a footnote to its opinion, the court distinguished *Poller* on the ground that here plaintiff had failed to present facts sufficient to show a real dispute.

Other recent cases where summary judgment has been granted include *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.,* D.C. D. N.J., 1962, 195 F. Supp. 85, affirmed, 3 Cir., 306 F.2d 61, and *United States* v.

Johns-Manville Corp., D.C. E.D. Pa., 1964, 237 F. Supp. 885.[58]

CONCLUSON

Examination of the facts revealed by the exhaustive discovery procedures and court hearings in this case discloses that the assertions in the complaint are bottomed only on a hope that at a full trial something might develop that would support appellant's claims. However, as matters now stand, despite exhaustive inquiry, appellant has failed to show (a) the existence of any case against Warren McMinimee; and (b) a claim for alleged conspiracy against any of the appellees.

---

[58] The *Johns-Manville* case involved a civil suit against several companies charging violations of Sections 1 and 2 of the Sherman Act. There had been a previous related criminal trial against some of the defendants before the same judge. In granting a motion for summary judgment, the court said, at p. 893:

> "The condemnation of trial by affidavit in cases such as Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), construed in the light of the subsequent amendment to Rule 56(e), is inapplicable to the instant case, where the Government relies chiefly on the allegations in its pleadings. The instant case is also distinguishable from Poller in that the record consists of testimony given by witnesses, during a criminal trial lasting over four months, who were subject to cross-examination and who had their demeanor appraised by the undersigned."

In the present situation, two of the defendants, TCCA and TC&DA, have recently been involved in a trial before the same judge. In that trial, which involved ownership and use of a trademark, the relationships between the parties was developed in the record. The earlier case is reported at 143 USPQ 12.

The partial summary judgment granted by the trial court was most appropriate and should be affirmed.

Respectfully submitted,

J. Pierre Kolisch
1004 Standard Plaza
Portland, Oregon 97204
Attorneys for Defendants-Appellees

Kolisch & Hartwell
Jon M. Dickinson
1004 Standard Plaza
Portland, Oregon 97204
Of Counsel

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Pierre Kolisch
Attorney for Defendants-Appellees